1960

C. G. Green v. Edgar E. Garn and Cleo V. Garn : Brief of Respondents

Utah Supreme Court

Ray S. McCarty;

Case No. 9303 Case No. 9302

IN THE SUPREME COURT of the STATE OF UTAH

C. G. GREEN,
Plaintiff and Appellant,

—vs.—

EDGAR E. GARN and
CLEO V. GARN,
Defendants and Respondents.

* * * * *

E. E. GARN,
Plaintiff and Respondent,

—vs.—

JENSEN, et al.,
Respondents and Cross Defendants,

C. G. GREEN,
Intervenor and Appellant.

BRIEF OF RESPONDENTS

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—vs.—

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Intervenor and Appellant.

Case No. 9302

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

The statement of facts in appellant's brief is largely accurate The appellant has unduly emphasized certain facts and insufficiently emphasized or entirely disregarded other important facts. Therefore, the respondents are constrained to re-state the facts in their entirety.

The parties will be referred to either as appellant and respondents or by their names. The two cases will be referred to by their number in this Court. Italics will be our own. The deposition of Dr. Green will be referred to as the Green transcript and the deposition of Garn will be referred to as the Garn transcript.

The appellant, Dr. C. G. Green, is a dentist and for years practiced in Salt Lake City. He tired of the practice of dentistry and thought he could make a living another way. His memory was bad as to what occurred back in those days, but he thought it was around 1940 when he quit dentistry. He bought the lease on the Copper Club, and at first he said he didn't remember what he paid for it and then he said he thought he paid $15,000.00 down (Green Tr. 2-4). He was sure he had a contract, but he didn't remember what it was and he had no papers at all. Whether the price was $15,000.00 or he paid $15,000.00 cannot be determined on account of the doctor's poor memory. The written agreement on which Dr. Green's claims are based showed that he owed additional money to one William Schmidt. There is nothing in the record or in the exhibits to show the contents of the lease on the Copper Club. In fact, he didn't remember that he ever saw a lease. He obtained an assignment and he doesn't know whether he had a copy of a lease or not. He didn't recall ever exhibiting a lease to the Garns. There were two men, Griggs and Stanfield, who had an interest in the lease. What it was does not appear and he never did meet them (Green Tr. 4-7).

Sometime in 1947 while the plaintiff and his wife, Cleo Garn, were operating the Lone Pine Lodge in Marysvale, Utah, they were contacted by Elmo Garff and Lynn Garff, dba Garff Realty, licensed real estate brokers. They represented Dr. C. G. Green for the purpose of inducing the Garns to purchase the interest of Dr. Green in the Copper Club at Ely, Nevada. Dr. Green represented to the Garns that the prior owners had been making from $70,000.00 to $80,000.00 per year, net, in operating the club, and he also represented there was $3,500.00 to $4,500.00 worth of liquor stock (R. 57, Case No. 9302).

The written agreement marked Exhibit "A," Case No. 9303, was dated December 10, 1947. It appears from this agreement that the Garns issued a promissory note in the sum of $5,000.00 to Dr. Green and assigned to him all of their interest in the Lone Pine Lodge. The agreement also provided that the Garns were to receive the sum of $500.00 a month as a living wage for operating the club, deduct operating expenses, and thereafter pay to Dr. Green each month all additional profits up to the sum of $500.00. Should the profit exceed $500.00 a month, then the Garns might pay any amount they wished on the purchase price. The entire purchase price had to be paid prior to the expiration of the term of the lease dated June 12, 1946. There is nothing in the record to show when the lease expired or its provisions. The contract also provided that the payments to Dr. Green should be applied first to any balances owing by Dr. Green to William Schmidt or by Dr. Green to Schmidt's predeces-

sors. There is nothing in the record to show the interest of William Schmidt or his predecessors. Then, finally, the agreement provides that Dr. Green would be entitled, upon failure of the Garns to perform after a 15-day written demand, to re-enter and take possession of the premises of the Copper Club without the necessity of court action.

This contract was prepared by the attorney for Dr. Green. The Garns were not represented. Before the Garns entered into the agreement, Dr. Green represented he had close to $5,000.00 worth of liquor stock, and when they went out to examine the place, Dr. Green showed the Garns boxes of liquor stacked up with the names Hyrum Walker and various other kinds of liquor. When they examined the liquor stock, there was not the amount represented by Dr. Green, but, on the contrary, less than $1,500.00 worth, and it turned out to be a private stock less than a month old, flavored with wood chips. Later when they opened the place, they had to pay Eva Oureta $1,000.00 for licenses. She was the owner of the premises. To operate, they had to sell their truck for $1,900.00, sell a piano for $450.00, and borrow $500.00 from Garn's brother (Garn Tr. 29 and 30).

Nevertheless, the Garns endeavored to operate the Copper Club and, owing to the fact of the general depression, they were unable to make any money out of

the place and finally, after exhausting their resources in the summer of 1948, Mr. Garn had a conversation with Dr. Green in Salt Lake City and Dr. Green said he felt bad that business had gone that way and for Garn to do the best he could, and if he could get someone in there and get something out of his interest, fine and dandy (Garn Tr. 17).

Mr. Garn recognized his obligation to help Dr. Green get something out of the club. "Well, absolutely! If I hadn't done, I believe I would have just walked out. At that point I believe I would have just walked out and slammed the door and left it like I found it" (Garn Tr. 22).

That day in Dr. Green's office, Mr. Garn told him his position and he would have to sell his equity, and Dr. Green said, "Well, go ahead and see what you can do with it. See who you can find to get in and take it over." Garn told Dr. Green he was without funds, without further means of getting any, and Dr. Green said, "Okay" (Garn Tr. 25).

Mr. Garn contacted the Garff Realty to dispose of his interest and they declined. Then he walked down to see C. Ed Lewis and explained the situation. Then about August 16, 1948, he received the following letter from Dr. Green:

1001 Boston Building
Salt Lake City, Utah

Mr. E. E. Garn
c/o Copper Club
Ely, Nevada

Dear Mr. Garn:

I had a long talk with Mr. McCormick last Saturday and gained a considerable amount of information from him concerning the sale of the Club. Apparently they have been misinformed as to the actual set-up between you and I, and as a result, have been having a tough time in their efforts to dispose of the Club for you. He also informed me that you have hindered instead of helping in the sale, this, perhaps because of your anxiety to have done with the whole thing. But there is a way that you can help a great deal, as I will outline to you.

I told him that you would be willing to take $5,000.00 and step out in favor of a new buyer, so he suggested this procedure: Take a new listing for 90 days under my signature at a price of $17,500.00 complete. Now rest assured that you will be protected to the extent of $5,000.00. Anything over that amount comes to me, and if a contract has to be written for any balance, a new one will be written between the new buyer and myself, thus cancelling the contract between you and I. I hope this is clear to you so there can be no misunderstanding when a deal is finally negotiated.

Now, for a word on how you can help. If at any time a prospect is sent out there, or if one should just happen in, you can assume the roll of operator of the Club and can do a good job of boosting it. Tell them the business you are doing, and you might go so far as to say you would like to buy it yourself if you could raise the money. There is no need for them to know of the

set-up between us, as that seems to scare them, making the deal too complicated; and that phase need not hinder at all according to the understanding we now have. But all negotiations must be referred to Mr. McCormick. If we can carry through on a set-up of this kind, Mr. McCormick thinks he can move the Club and promises to go to work on it, but only under these conditions.

Let me hear from you by return mail so that I can let him know that you agree to this procedure. I think we will all benefit as everything will be on the up and up and there will be no doubts in the mind of any one. Let's get behind and push.

Respectfully,

C. G. GREEN, DDS

Then on September 18, 1948, Mr. Garn signed Exhibit "G" with the C. Ed Lewis Company and Burrows, Jensen, and Payne, wherein he sold all of his interest in the club to Burrows, Jensen and Payne. The Garns received $3,100 in cash for their interest and a $900.00 note. After deducting commission and expenses, Mr. Garn received $2,300 cash (R. 58, 59, Case No. 9302). The same day, September 18, 1948, Exhibit "F," an Earnest Money Receipt to purchase the Copper Club, was signed by Burrows, Jensen and Payne. This was not signed by Dr. Green nor Mr. Garn. Jensen, Burrows and Payne took over the club sometime in September — according to the pleadings, around September 18, 1948. Thereafter, with full knowledge of Dr. Green and with his consent, Payne, Burrows and Jensen took over and started operating the business (R. 59, Case No. 9302). Mr. Garn stayed three days after the new operators,

Payne, Jensen and Burrows, took over to help show them where the light switches were, the gas, and all that should be done (Garn Tr. 22).

Then Mr. Garn went to Santa Clara to operate a restaurant with his brother. It was there that he next saw Dr. Green sometime in February or March of 1949, when Dr. Green stopped in their restaurant at Santa Clara and told the Garns that the people out in Ely were doing pretty good and he thought they would make out okay (Garn Tr. 26).

Sometime in February, 1949, a car in which the Garns had an equity was attached. They thought the suit was for a $5,000.00 note they had given Dr. Green. Mr. Garn contacted the Garffs and they said they would take care of the $5,000.00 as soon as they sold the Lone Pine Lodge, and Garn thought nothing more about this case, No. 9303 (R. 59, Case No. 9302).

The Garns heard nothing more about this case. They knew nothing more about the claim of Dr. Green against them until October 2, 1959, when the Sheriff of Utah County levied on their equity in their home and cars (R. 60, Case No. 9302).

The $900.00 note was not paid and Mr. Garn turned it over to a St. George lawyer for collection, who sent it to Salt Lake lawyers who started the action on December 29, 1948, in Case No. 9302 (R. 1). The Garns were never in the office of Gustin and Richards and never

talked to them personally. Jensen, Burrows and Payne answered and counterclaimed and brought in C. Ed Lewis Company and McCormick as a cross-complainant (R. 5-15, Case No. 9302).

On the 9th day of February, 1949, C. G. Green brought suit against E. E. Garn and Cleo Garn, Case No. 9303. On the first cause of action, he asked for $4,000.00 on the note and $500.00 attorney's fees. In his second cause of action, he asked for $10,000.00 judgment against them on account of the contract with the Garns, alleging that the Garns had breached the agreement by selling and assigning the Copper Club without his consent to Jensen, Payne and Burrows. On his third cause of action, he asked for an additional $5,000.00, or a total of $19,500.00 (R. 1-6, Case No. 9303).

A default certificate was entered in this case (No. 9303) on the 24th day of March, A.D. 1949. This was later set aside and the defendants allowed to answer (R. 21, Case No. 9303; answer and counterclaim, R. 21 and 25, Case No. 9302). In Case No. 9302 in his complaint in intervention, Dr. Green asked for judgment against the Garns in the sum of $10,000.00 and also an alternative for $3,100.00 received by him on account of the sale of the Copper Club. Dr. Green filed an amended complaint in intervention on March 18, 1950, in Case No. 9303, almost a year after he had entered his default against the Garns for $19,500.00 (R. 36-40, Case No. 9302. The complaints in intervention also sought relief against E. E. Garn, Jensen, Payne and Burrows, and C.

Ed Lewis Company and McCormick.

In paragraph 7 of his complaint in intervention (R. 38, Case No. 9302), Dr. Green alleged the place was worth in excess of $10,000.00, and Jensen, Payne and Burrows were willing to pay that to him. In paragraph 10 (R. 38A, Case No. 9302), Dr. Green admitted that he discussed with cross-defendant McCormick his interest in the Copper Club and his willingness to sell his interest. Then Dr. Green filed his second amended complaint in intervention on the 26th of April, 1950. In paragraphs 10 and 11 of the second amended complaint (R. 46, Case No. 9302), Dr. Green alleged as follows:

> "10. Defendants entered upon possession of the Copper Club at Ely, Nevada, on or about September 18, 1948, and continued in peaceable possession thereof until on or about March 15, 1949, on which date defendants abandoned the said premises.
>
> "11. The aforesaid possession of the defendants was acquiesced in by the intervenor, and defendants' offer to pay the intervenor $10,000.00 was accepted by the intervenor's said acquiescence and consent."

Defendants referred to were Jensen, Burrows and Payne.

Then on April 4, 1956, Dr. Green as intervenor filed a default certificate against E. E. Garn (R. 51, Case No. 9302), and on the same day he took a default judgment against E. E. Garn for $10,000.00. Nothing was done then in the case until October 7, 1959, when he obtained a garnishment and writ of attachment and garnisheed

the wages of Mr. Garn and attached the automobiles and home of Mr. and Mrs. Garn. The plaintiff moved to set aside the judgment and default and be allowed to answer (R. 54-63, Case No. 9302). The court on December 6, 1959, granted the motion and the order was signed (R. 65-66, Case No. 9302).

In the case of Dr. Green against Mr. and Mrs. Garn, Case No. 9303, the plaintiff filed a default certificate on the 24th day of March, 1949. This was prior to the time he filed his complaint in intervention in Case No. 9302. The Garns moved to dismiss this case (R. 14-15, Case No. 9303). The Court granted the motion to dismiss the first cause of action, which was for $4,500.00 on account of the original note given by the Garns to Dr. Green. Thereupon, on the 14th day of December, 1959, appellant's attorney served two copies of the complaint in this case on the defendant, and thereafter the Garns filed their answer and counterclaim (R. 21-25, Case 9303). The default of the Garns had been set aside. They were allowed to answer.

On the 25th day of April, 1960, Dr. Green moved for summary judgment against the Garns for $5,000.00 on the third cause of action, and agreed if the motion was granted to dismiss the second cause of action and also dismiss Case No. 9302 with prejudice. The Garns then moved for summary judgment against Dr. Green in both cases. The motion for summary judgment by Dr. Green was denied and the motions of the Garns in both cases were granted.

PRELIMINARY STATEMENT

The appellant's brief on Point II, "Was there an abandonment of the premises by the appellant?" the respondents feel this is not a question involved in the case; it should have been, "Was there an abandonment of the contract, or was there an abandonment by the appellant of any claim against the Garns?"

In view of that, the respondents will discuss this case under the following points:

1. THERE WAS A RESCISSION OF THE DECEMBER 10, 1947 CONTRACT.

   (a) There was a surrender of the premises, and

   (b) There was an abandonment of any claim against the respondents by the appellant.

2. THE APPELLANT IS ESTOPPED FROM CLAIMING RELIEF FROM THE GARNS.

ARGUMENT

POINT I

THERE WAS A RESCISSION OF THE DECEMBER 10, 1947 CONTRACT.

Generally speaking, a lawful rescission of a contract by mutual agreement puts an end to it for all purposes. Accordingly, it is held that in the absence of circumstances pointing to a different intention, neither party can maintain an action on the rescinded contract for previous breach thereof. Note 24 *A.L.R.* 253.

Utah has subscribed to this doctrine. In the case of *Megeath v. Ashworth, Supreme Court of Utah* (*Mar. 2,*

1921), *57 Utah 564, 196 Pac. 338,* the defendant testified that some months after sale of car and the execution of the note, he advised plaintiff that the car was of no service to him and asked him to give back the note and declare the deal off, to which he testified the plaintiff replied:

"All right, take the car and put it in my barn."

Accordingly, the defendant returned the car to the premises of the plaintiff and, finding the garage closed, left the car in the yard near the garage. That was something like five years prior to the institution of the action and the car had remained in the possession of the plaintiffs ever since. Court held a rescission and judgment for defendant and it was affirmed by the Supreme Court.

Talbot v. Anderson, Supreme Court of Utah (Oct. 28, 1932), 80 Utah 436, 15 P2d. 350:

> "An action cannot be maintained for the breach of a contract which has been rescinded or canceled, even though such rescission or cancellation is by mutual consent, either express or implied, of the parties."

See also *Schwab Safe & Lock Co. v. Snow, 47 Utah 199, 152 Pac. 171;* and *Black on Rescission, Vol. 2, page 1072.*

Restatement of Contracts, Section 406(a):

> "Agreement to rescind need not be expressed in words. Mutual assent to abandon a contract, like mutual assent to form one, may be manifested in other ways than by words. Therefore, if either party even wrongfully expresses a wish or intention to abandon performance of the contract and the other party fails to object, there may be sometimes circumstances justifying the inference

that he assents. If so there is rescission by mutual assent. . . ."

Considering the facts most favorably to the appellant, Dr. Green, there is no escape from the conclusion that there was a mutual rescission. When they entered into the contract the Garns made a payment of $5,000.00, represented by the assignment of their interest and sale of their property in the Lone Pine Lodge at Marysvale. The contract did not provide for any special monthly amount to be paid by the Garns, but only that they were to give Dr. Green 50% after they paid the expenses and took $500.00 per month as a living wage.

Various false and fraudulent representations were made by Dr. Green as to the earnings of the club and as to the condition of the club to be operated. The Garns went out to operate the place and when they did find out about the false and fraudulent representations, they were in such a financial condition that they had no choice but to try and operate the club. The Garns never did make the $500.00 living wage, let alone anything in excess, so at no time were they behind in any payments.

After selling practically everything they owned and borrowing everything they could, they found in the Summer of 1948 they could no longer operate. Garn went to see Dr. Green and Dr. Green told him to do the best he could, and get somebody else in these and get something out of his interest (Garn Tr. 17).

Dr. Green talked to Mr. McCormick, a real estate salesman for C. Ed Lewis Company and a cross-defend-

ant in Case No. 9202. Dr. Green told him to go ahead and sell the place and also told him what Green's interest was in it (Green Tr. 12). The letter of Dr. Green to E. E. Garn in August 1948 corroborates this. The letter indicates that he had a long talk with McCormick. This letter proves that McCormick and C. Ed Lewis Company were his agents. Dr. Green goes so far in his letter that he advised the Garns to use fraud and deceit if necessary to get someone to take over the business. In the letter Dr. Green says that everything will have to be referred to Mr. McCormick. McCormick obtained Jensen, Burrows and Payne to purchase the *interest* of the Garns. McCormick then sold the doctor's interests to them. This agreement, Exhibit "G," was signed by Jensen, Payne and Burrows, but not by the doctor. Jensen, Payne and Burrows took over the operation of the club about September 18, 1948, and in his pleadings the doctor said that this was done by his (the doctor's) *acquiescence* and *consent*. Dr. Green at no time warned the Garns that he was holding them to the lease or the contract. His actions and his words and his written letter demonstrated that he was releasing Garns en toto and accepting Jensen, Payne and Burrows. This rescission, cancellation and abandonment not only was oral but in writing of Dr. Green and there is also the acts of the parties.

17 CJS, page 880, Sec. 388:

> "The cancellation, abandonment, or rescission of a written contract may not only be written but it may also be oral or by implied agreement, which

> may be shown by the acts of the parties and the surrounding circumstances."

There was a surrender. The Garns never had the lease; they only had a right to the lease when Dr. Green or his agents, the Garffs, turned it over to him. The doctor didn't even know what the provisions in the lease were, and the Garns had never seen the lease, but it is conceded that the doctor had some right of possession there. For awhile he allowed the Garns to occupy the premises, then when the premises were turned over by Dr. Green's agent, McCormick, to Jensen, Payne and Burrows, there was a surrender of the premises as far as the Garns were concerned. It was by the actions of Dr. Green that the Garns were supplanted by Jensen, Payne and Burrows. This was recognized by Dr. Green and in his pleadings he said that they were there by his *consent* and *acquiescence* and, therefore, Jensen, Payne and Burrows should pay him. Dr. Green allowed, consented, and contracted so that Jensen, Payne and Burrows took over the contract and the possession of the place. Under the very terms of the original contract, the Garns would have to retain the possession in order to pay as provided in the contract. There was a surrender. See *Belanger v. Rice, Supreme Court of Utah (July 2, 1954), 2 Utah 2d 250, 272 P2d. 173; John C. Cutler v. DeJay Stores, 3 Utah 2d 107, 279 P2d. 700; Dunles Inc. v. Fidelity Company, 165 S.W. 612.*

J. K. Armsby Co. v. Grays Harbor Commercial Co. et al., Supreme Court of Oregon (1912), 123 Pac. 32:

"The term 'rescission,' in relation to contracts, can only apply to the unmaking of the contract, the revoking of it by mutual agreement of the parties; or it may be effected by an attempt to revoke the contract by one party, acceded to by the other, or a breach by one which precludes him from any remedy thereon, and for which the other party revokes it. Miller v. Shelburn, 15 N.D. 182, 107 N.W. 51; Bannister v. Read, Gilman (Ill.) 92.

"In the case before us, the cancellation was not mutually accomplished, as each party acted independently; but each recognized the contract as at an end. When a contract is mutually rescinded, the parties are placed in their original position, as if it had not been made."

On page 35:

"In Graves v. White, 87 N.Y. 463, 465, it is said: 'The doctrine of these authorities is that the refusal of one party to perform his contract amounts on his part to an abandonment of it. The other party thereupon has a choice of remedies: He may stand upon his contract, refusing assent to his adversary's attempt to rescind it, and sue for a breach, or, in a proper case, for a specific performance; or he may assent to its *abandonment,* and so effect a dissolution of the contract by the mutual and concurring assent of both parties. In that event, he is simply restored to his original position, and can neither sue for a breach nor compel a specific performance, because the contract itself has been dissolved.'"

Call it what you will, there was a mutual rescission of the contract, a waiver by Dr. Green of any claim

against the Garns, and there was a cancellation and abandonment of the contract and surrender of the premises. Jensen, Payne and Burrows were accepted as new tenants by Dr. Green. They were also substituted as purchasers of the Copper Club.

POINT II

DR. GREEN, THE APPELLANT, IS ESTOPPED FROM CLAIMING RELIEF AGAINST THE GARNS.

By Dr. Green's letter and by his conversation, the Garns were given to understand that if someone else took over the Copper Club they could leave and take what little money they could get for their interest in the club and be on their way without any further claim from the doctor. Even in February 1949 at Santa Clara, the doctor told the Garns that Jensen, Payne and Burrows were doing fine and would make out all right. All the circumstances surrounding the transaction are to the effect that Dr. Green had released the Garns. The Garns could not turn the place over to Jensen, Payne and Burrows and still comply with the contract of December 10, 1947. Dr. Green knew the Garns were down and out and broke. He was willing that they should get out of the picture. His letters and his conversations contradict his deposition as to McCormick not representing him, and the pleadings that he filed in Case No. 9303 without question show that he acquiesced and consented to the Garns being supplanted by Jensen, Payne and Burrows. The doctor waived all rights against the Garns, and his conduct was such that he is estopped to deny that he con-

sented to or intended a waiver or rescission. *Kelly v. Richards et al., Supreme Court of Utah (Nov. 4, 1938), 95 Utah 560, 129 A.L.R. 164, 83 P2d. 731; 31 C.J.S. 260, Sec. 69.*

CONCLUSION

Dr. Green was never able to make a success out of the operation of the Copper Club, but he attempted to make a success of this venture by litigation.

It has been difficult to follow through the maze of cases commenced by Dr. Green surrounding this Club.

1. Green v. the Garffs in the District Court of Salt Lake County, Case No. 84478 (Nov. 1947), involved $5,000.00 note of the Garns.
2. C. G. Green v. Garns, Case No. 9303 (Feb. 9, 1949), for same relief asked against the Garffs, plus $15,000.00 additional.
3. Case No. 9302, Dr. Green as intervenor v. Frances B. Jensen et al., Dr. Green v. C. Ed Lewis Co. and W. A. McCormick, and Dr. Green as intervenor against the Garns (Jan. 1950).

In this case, he asked for $13,100.00 against the Garns, notwithstanding he had already entered a default in Case No. 9303 on March 24, 1949. In April 1956, a default judgment was taken against the Garns in Case No. 9302 for $10,000.00.

Thus, we see that Dr. Green attempted to recover from practically everyone connected with him in any way in the Copper Club. The Garffs were his agents, as were C. Ed Lewis Company and W. A. McCormick, and, of

course, Jensen, Payne and Burrows were the people he permitted to take over the operation of the club and to supplant the Garns.

Motions to dismiss these two cases for failure to prosecute were denied. The respondents maintain that this issue is still before this Court, or any other issue that would justify a summary judgment in favor of the respondents.

There was mutual rescission which was amply proved by the admissions of Dr. Green, the letter of Dr. Green, his pleadings, and the actions of the parties.

By the same token, there was an abandonment of the contract with the Garns by Dr. Green, and as far as the possession of the premises was concerned, there was a surrender by Dr. Green's accepting Jensen et al. as the operators and occupants of the club; and Dr. Green is estopped to deny now that he consented to or intended a waiver or rescission of the contract.

The summary judgments of the lower Court should be upheld. It would be highly inequitable to hold otherwise.

Respectfully submitted,

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